SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. PEN-15-618

JAMES-ROBERT G. CURTIS,

Plaintiff/Appellee

- v. -

FLORANIA DA SILVA MEDIEROS

Defendant/Appellant

ON APPEAL FROM A JUDGMENT OF THE
MAINE DISTRICT COURT, THIRD DISTRICT, BANGOR

BRIEF OF APPELLEE

JASON C. BARRETT, ESQ., Bar No. 4326
EATON PEABODY
204 Main Street
Ellsworth, Maine 04605
207-664-2900

Attorneys for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

STATEMENT OF FACTS

The Trial Court did an exceptional job setting forth the background facts and the facts as found at the hearing held on September 16, 2015, in its Order on the Motions, and in its Order on a Rule 52 Motion. Curtis hereby incorporates herein by reference the facts and findings of fact set forth in those orders. For convenience, a summary of the background facts is provided as follows:

The parties in this case were divorced pursuant to a Divorce Judgment dated September 9, 2011. The parties have one minor child, [Daughter], born in .

Curtis is the child's father. He is a graduate of Maine Maritime Academy and is employed by Key Lakes IV, Inc. Curtis works as an engineer aboard a ship in the Great Lakes and has a schedule of sixty days on duty, and thirty days off duty. Curtis typically works the month of January but does not work the month of February and part of the month of March. In mid to late March, Curtis returns to work and a work schedule is developed for the year. Typically, Curtis is deployed out of state for the months of April, May, July, August, October, November, and part of December.

Medeiros works from home as an interpreter for On Line Interpreters. She is a dual citizen of both the United States and Brazil. Medeiros was born in the city of Natal, which is a large city in the State of Rio Grande do Norte in Brazil. Her

mother still resides in Natal. The parties met in Brazil when Medeiros's mother was a host family for Curtis while he was a mid-shipman at Maine Maritime Academy. While the parties were together they made annual trips to Natal, where they spent time at the home of Medeiros's mother.

The parties have a difficult relationship. They do not communicate well, and they do not trust each other. There is very little co-parenting. Since Curtis is shipping for extended periods of time and unavailable, Medeiros has gotten used to making unilateral decisions regarding the child. The emails sent to Curtis by Medeiros were often not polite and were sometimes ignored by Curtis. Curtis believes that Medeiros speaks negatively about him in front of the child. It is fair to say that each party is frustrated with the other.

Despite their differences, the child is happy and emotionally well-adjusted. She is currently in the first grade and doing well in school. The child misses her father when he is away, but enjoys spending time with her paternal grandparents,

In the Divorce Judgment dated September 9, 2011, the Court authorized Medeiros to take the child with her to Brazil as of August 13, 2013, or earlier, if certain provisions had been met. In September of 2013, Medeiros and the child went to Brazil and stayed with Medeiros's mother. There were no problems during the trip, and Medeiros very much wants to take the child back to Brazil, so

that the child can have a relationship with her maternal grandmother. The parties disagree on whether or not it is safe for the child to travel to Brazil at a young age. Medeiros believes that she can keep the child safe since she is a native of Brazil, speaks the language, has family in the area, and knows the area. Curtis, however, does not trust Medeiros, and he has concerns regarding the crime rate in Natal and the risk to Americans traveling in Brazil.

Medeiros first filed the Motion to Modify seeking to modify the schedule of contact with the child and to modify the Divorce Judgment to order that Curtis sign the necessary documents so that the child can obtain a new passport and visa and travel to Brazil. Medeiros later filed a Motion to Enforce, seeking the court to order that Curtis comply with the Divorce Judgment by completing the necessary paperwork so that Medeiros could take the child on annual trips to Brazil. Early in the progress of the case, by mutual agreement and specific request of the parties, Dr. Diane Tennies, Ph.D., a licensed clinical psychologist, and very experienced Guardian ad Litem ("G.A.L.") was appointed to assist the Trial Court in this matter. The Order Appointing the G.A.L. specifically required the G.A.L. to investigate the issues related to travel to Brazil by the child and communication and co-parenting, and other issues which included contact with the child while Curtis is away working on the Great Lakes.

The hearing transcript and the Trial Court's Order on the Motions and its Order on a Rule 52 Motion for Additional Findings of Fact and Additional Conclusions of Law, fairly reflect the testimony and evidence presented at the hearing and the Trial Court's resulting findings of fact and conclusions of law.

STATEMENT OF ISSUES PRESENTED

I. Whether the District Court Erred or Acted Within its Discretion and Authority Under Applicable Maine Law in Resolving a Dispute Between Parents, Each Having Equal Shared Parental Rights, By Allocating Limited Regular Contact Between the Child and a Familial Third Party, Based on the Recommendation of the Guardian ad Litem, the Supporting Consent of One of the Parents, and a Finding that the Allocation was in the Best Interest of the Child.

A. Whether the Trial Court's factual findings were correct and are entitled to substantial deference on this record.

B. Whether Medeiros Has Properly Preserved the Issue of the Constitutionality of 19-A M.R.S. §1653(2), nor Given the Department of Attorney General Notice and Opportunity to Intervene.

C. Whether 19-A M.R.S. § 1653(2) is Constitutional as Applied on These Facts.

D. Whether Maine Currently Recognizes Limited Transfers of a Portion of a Parent's Rights of Contact to a Family Member Who Has a Significant Relationship With a Child When Certain Duties Interfere With the Parent's Contact and the Limited Transfer is in the Child's Best Interest.

SUMMARY OF THE ARGUMENT

This matter comes before this Court on Medeiros's Post-Judgment Motions to Modify and to Enforce. On September 18, 2015, the District Court (*Campbell, J.)* rendered a final Order and decision in this matter and made extensive and very detailed factual findings. App. 19-30. The Trial Court's decision cited to the report of the Guardian ad Litem, Dianne Tennies, Ph.D., and accepted many of her recommendations concerning the best interests of the parties' minor child, [Daughter], born . *Id.* However, the Trial Court did not adopt wholesale the recommendations of the Guardian ad Litem (hereinafter "G.A.L."), and clearly demonstrated that the trial judge properly applied the Trial Court's own analysis and independent judgment in fashioning a result designed to further the best interests of the child. *Id.*

The Trial Court's decision was correct as a matter of law. It properly and reasonably balanced the many considerations that trial judges have to apply in complex family cases (19-A M.R.S. § 1653(3)(A)-(S)) and there are no good grounds to disturb the Trial Court's decision on appeal.

As in all bench tried cases, the Trial Court's factual findings are entitled to be given deference in this matter. *Harmon v. Emerson*, 425 A.2d 978, 982 (Me. 1981). However, it is especially true in family matters that the trial court is in the best position to assess and evaluate the character and parenting capacities of the

parties; and to make assessments that should not be disturbed unless there is plain and obvious error. *Shirley v. Shirley,* 482 A.2d 845 (Me. 1984); *Coppola v. Coppola*, 2007 ME 147.

Moreover, the Trial Court's factual findings are fully consistent with applicable statutes (19-A M.R.S. § 1653(1)-(4)) and foundational case law concerning the factors to be applied in assessing the best interests of children and crafting nuanced arrangements to serve those best interests. *Ziehm v. Ziehm,* 433 A.2d 725 (Me. 1981); *Campbell v. Campbell*, 604 A.2d 33 (Me. 1992). The Trial Court's Order on the Motions reflected a careful weighing of well-considered and substantial factual evidence, measured by the best interest of the child standard informed by a very experienced and highly qualified G.A.L. Thus, the Trial Court's decision was neither an abuse of discretion, nor founded on any error of law.

Despite the valiant efforts of Medeiros to frame the issues as a grandparents rights case—it is not. It is a much more pedestrian, fact based, shared parental rights case involving parents who have significant difficulty communicating and co-parenting with each other. In resolving a fact based decision-making scheduling dispute between parents having equal parental rights, the Trial Court's Order is not a violation of Medeiros's parental rights, but a validation of Curtis's equally shared parental rights. Throughout her brief, Medeiros takes pains to

contrast her own fundamental parental rights against the contrived specter of lesser rights her daughter's paternal grandparents might have to third-party visitation. Having set up this matter as a contest between those sets of rights, she goes on to rely on this Court's prior decisions interpreting the Grandparents Visitation Act (M.R.S. 19-A § 1801 *et seq.*) and under 19-A M.R.S. § 1653(2)(B) relating to circumstances in which third-party grandparents independently, and over the objection of a child's parents, petition the court for rights of contact or for parental rights and responsibilities such as *Davis v. Anderson*, 2008 ME 125, ¶ 14, and *Rideout v. Riendeau*, 2000 ME 198.

Medeiros's reliance on those cases is misplaced because she has fundamentally misapprehended the nature of the conflicting rights involved in the Trial Court's Order on the Motions. This matter does not call for the Court to weigh Medeiros's fundamental parental rights against some lesser interest of her child's paternal grandparents. Rather, it calls into question the Trial Court's authority and exercise of discretion in weighing the coordinate, coequal, and competing shared parental rights of Curtis and Medeiros in resolution of a fact based, decision-making dispute, informed by the recommendations of a very experienced and highly qualified G.A.L., and guided by the loadstar of the best interest of the child standard—a task family courts are routinely called upon to perform.

The authorities Medeiros relies on involve petitions for contact or for parental rights and responsibilities filed by third parties, over the objection of all of the child's living parents, thereby seeking to supplant the decision-making authority of each of the involved parents. The circumstances of those cases are distinctly and fundamentally different than the circumstances involved here.

Here, no third party has petitioned, or independently asserted a right to contact with the child. Rather, the G.A.L. recommended that the Court incorporate into the Order a modest scheduling mechanism—a limited transfer of the father's contact time—to facilitate limited but regular contact between the child and a familial third party for the benefit and psychological protection of the child, which recommendation the child's father whole-heartedly endorsed. Curtis, the child's father, and holder of parental rights and responsibilities of equal dignity with Medeiros's, endorses and supports the incorporation of a structuring mechanism into the Order that permits him to transfer a very limited portion of his own contact time to the child's paternal grandparents during his two-month merchant marine deployments out of State.

A more helpful and analogous guide than the grandparental rights cases identified by Medeiros is found in 37-B M.R.S. § 389-A(7), a portion of the Maine Servicemembers' Civil Relief Act, whereunder a parent may transfer a limited portion of the parent's own rights of contact to a family member who has a

significant relationship with a child, when a duty-related absence interferes with the parent's contact with the child and the limited transfer is in the child's best interests.

Here, the issue is not a contest of fundamental parental rights versus the rights of third parties; rather, this case involves a more mundane factual decision-making clash between two parents, and the fundamental parental rights they share, neither having greater weight than the other, unable to reach a decision on how to facilitate regular beneficial contact with the paternal grandparents, despite the clear guidance from the G.A.L. that such contact is in the best interest of the child. As a practical matter, at issue is approximately seven visits a year between the child and the paternal grandparents, each a day long, during months Curtis is away working two-month deployments on the Great Lakes.

Importantly, the Trial Court's Order on the Motions does not rest on a finding that the grandparents have an independent right of contact by virtue of their status as grandparents. Consequently, there was no need for a threshold standing determination; a requirement when a party seeks the aid of a court to invoke or assert an independent right. Rather, the Trial Court's decision was rooted in the recommendation of the G.A.L. in relation to this "unique" set of facts. Tr. 73:23-74:2-20. It was specifically grounded in recognition of the father's right "to have input on where [his child] spends part of one weekend a month when he is away at

work" (App. 33) and in the G.A.L.'s opinion, and as the Trial Court's found, the scheduled third-party contact was necessary to "protect the child from psychological harm." App. 26, 34. Accordingly, the Trial Court's Order both respects Curtis's fundamental parental rights and serves his daughter's best interests.

The Trial Court based its findings and conclusions in the Order on ample testimony and other evidence, including the report, recommendations, and testimony of the highly qualified and experienced G.A.L. appointed in the matter, whose recommendations were provided to all parties well in advance of the hearing. The reasonable and modest contact between the grandparents incorporated into the Order on the Motions is rooted in the rights of Curtis, a parent having shared rights and responsibilities. The Trial Court's limited allocation of a portion of the father's time to the paternal grandparents was well within the Trial Court's discretion and authority to resolve a difficult, fact based, decision-making dispute between the parents, in consideration of the best interest of the child standard—a task that the family courts are routinely called upon and particularly qualified and empowered to do.

Medeiros raised the question of the constitutional invalidity of 19-A § M.R.S. § 1653(2) late in the game; namely, in her Motion for Reconsideration dated November 20, 2015. Hence, neither party had the opportunity to fully

develop the record on this question of first impression. This Court should not elect to consider this argument without such a record; and without the benefit of full analysis of this issue by the Trial Court. Moreover, when raising this issue, Medeiros did not give the notice required by 14 M.R.S. § 5963 to the Department of the Attorney General. The Attorney General has therefore been deprived of the opportunity to defend the constitutionality of the statute. Accordingly, ordinary jurisprudential considerations should preclude the Court from even considering Part I of Medeiros's arguments. *See* M.R.Civ.P. 24(d).

The well-reasoned decision of the Trial Court should not be disturbed on appeal. If the Court chooses to give any weight to Medeiros's constitutional challenge of a well-established law, the most logical and appropriate result would be a remand to the Trial Court with instructions to allow intervention by the Attorney General, and to fully develop the record for later consideration of this issue.

ARGUMENT

I. The District Court Did Not Err and Acted Within its Discretion and Authority Under Applicable Maine Law in Resolving a Dispute Between Parents, Each Having Equal Shared Parental Rights, By Allocating Limited Regular Contact Between the Child and a Familial Third Party, Based on the Recommendation of the Guardian ad Litem, the Supporting Consent of One of the Parents, and a Finding that the Allocation was in the Best Interest of the Child.

On September 18, 2015, the District Court (*Campbell, J.)* rendered a final Order and decision in this matter and made extensive and very detailed factual findings. App. 19-30. The Trial Court's decision cited to the report of the G.A.L., Dianne Tennies, Ph.D., and accepted many of her recommendations concerning the best interests of the parties' minor child, [Daughter], born . *Id.* However, the Trial Court did not adopt wholesale the recommendations of the Guardian ad Litem (hereinafter "G.A.L."), and clearly demonstrated that the trial judge properly applied the Trial Court's own analysis and independent judgment in fashioning a result designed to further the best interests of the child. App. 34. ("A Court making a determination involving parental rights and responsibilities must seek not merely to preserve the child from harm, but also to discern as a wise, affectionate, and careful parent what custody arrangements will further the child's best interests.")

The Trial Court's decision was correct as a matter of law and it properly balanced all of the many considerations that trial judges have to apply in complex

family cases (19-A M.R.S. § 1653(3)(A)-(S)). Accordingly, it is due deference, and there are no good grounds for it to be disturbed on appeal.

Moreover, the Trial Court's factual findings are fully consistent with applicable statutes (19-A M.R.S. § 1653(1)-(4)) and foundational case law concerning the factors to be applied in assessing the best interests of children and crafting nuanced arrangements to serve those best interests. *Ziehm v. Ziehm, supra*; *Campbell v. Campbell, supra.* Hence, the Trial Court's decision was neither an abuse of discretion, nor is it founded on any error of law.

A. The Trial Court's Factual Findings Were Correct and Are Entitled to Substantial Deference on this Record.

An order on a post-divorce motion is reviewed on appeal for abuse of discretion or other error of law. *Smith v. Padolko*, 2008 ME 56, ¶ 9. On a post-judgment motion to modify a divorce judgment, "an abuse of discretion will only be found if the award is plainly and unmistakably an injustice that is so apparent as to be instantly visible without argument." *Id.* (citing Levy, *Maine Family Law Pleadings and Procedure* § 4.13.3 at 61 (5th ed.) (citing *Capron v. Capron,* 403 A.2d 1217, 1218 (Me.1979)).

A trial court's factual findings are entitled to be given significant deference, as in all bench tried cases, especially in family matters, where the trial court is in the best position to assess and evaluate the character and parenting capacities of the parties. *Shirley v. Shirley,* 482 A.2d 845 (Me. 1984); *Coppola v. Coppola*, 2007

ME 147. The Trial Court's assessments should not be disturbed unless there is plain and obvious error. *Id.*

Contrary to the framing of the third-party visitation issue by Medeiros as a grandparents' rights issue, the Trial Court's allocation of limited regular contact between the child and the child's paternal grandparents is a factual determination, a scheduling mechanism rooted in the rights of the father "to have input on where [the child] spends part of one weekend a month when he is away at work." App. 33.

The Trial Court's decisions and disputed allocation of contact with the child were based first and foremost on the Trial Court's finding that it was in the best interest of the child for the mother and the father to continue to have shared parental rights and responsibilities, despite their difficulties co-parenting. App. 23. The Trial Court's decision as to shared parental rights and responsibilities was supported by and reflected agreement of both parents on that issue. The shared parental rights and responsibilities decision was consistent with the recommendation of the G.A.L., who was appointed to assist the Court in this matter by mutual consent and specific request of the parties. The parties specifically requested and consented to the Guardian ad Litem selection of Dr. Diane Tennies, Ph.D., a licensed clinical physiologist, with significant experience working with children. *See* Order Appointing Guardian Ad Litem, docketed

9/23/2014, App. 12.[1] Moreover, the Court recognized and relied on Dr. Tennies' substantial experience, education, and expertise in difficult family matters. App. 24, 34.

The Trial Court, mindful that the parents shared parental rights and responsibilities, based its decisions regarding the third-party allocation and scheduling of contact with the child on substantial factual findings—findings that resulted from ample testimony and other evidence, which included the report, recommendations, and testimony of Dr. Tennies, and the testimony of each of the parents. In its Order, the Trial Court provided five paragraphs of findings of fact and conclusions of law on this issue. App. 25. The Trial Court provided an additional ten paragraphs of findings of fact and conclusions of law in its Order in response to Medeiros's motion pursuant to M.R.Civ.P. 52 (the "Rule 52 Motion"). App. 31-36.

The Trial Court, in making its factual determinations necessary to resolve the point of disagreement between the parents, each having equal shared parental rights and responsibilities, was correct in basing its decision on its factual finding that the allocation of minimal, but regularly scheduled, contact with the paternal grandparents was in the best interest of the child. The factual finding was consistent with the recommendation made by Dr. Tennies. App. 26, 34. At the

[1] Counsel sites directly to the record in this instance and in other instances throughout this Brief, because opposing counsel prepared and filed the Appendix without consultation.

hearing, Dr. Tennies testified that her recommendation regarding the grandparent time was "somewhat unique" but "in this case there are some psychological reasons that the Court may want to be mindful of, of why this ongoing contact is in her best interest" and necessary to "protect her" (Tr. 73:23-25; 74:1-20; 91:15-25).

On the allocation issue, the Trial Court gave great weight to the testimony and recommendations of Dr. Tennies, a licensed clinical psychologist. The Trial Court found Dr. Tennies to be "very experienced, neutral, and fair...very credible" and placed "substantial weight on her recommendations" and testimony. App. 34. Specifically, the Trial Court agreed with Dr. Tennies' opinion regarding the importance of including in the Order, mechanisms for the paternal grandparents to have contact with the child, for the child's benefit and psychological well-being, and in fact to protect and preserve the child from psychological harm. *Id.* The Trial Court further found that the parents have shared rights and responsibilities and "one of the parents, the [father], fully supports his parents having contact with the minor child while he is out of State." App. 33. The Trial Court also found that the very limited contact with the grandparents contemplated by the Order "will not interfere with the mother's fundamental right to parent her own child, nor will it infringe on the mother's right to make decisions regarding her child." App. 34-35.

Here, deference is due to the Trial Court's decision to build into the Order a reasonable and modest scheduling mechanism deemed necessary by the G.A.L. to

protect the child. The Trial Court's decision was a careful exercise of the Trial Court's authority to resolve a fact based decision-making dispute between parents who have equal shared parental rights and responsibilities, and excruciating difficulty communicating and co-parenting, in consideration of the best interest of the child standard—a task that family courts are routinely called upon to do.

B. Medeiros Has Not Properly Preserved the Issue of the Constitutionality of 19-A M.R.S. §1653(2), nor Given the Department of Attorney General Notice and Opportunity to Intervene.

Medeiros's first argument, that the Trial Court erred in awarding rights of contact to the child's paternal grandparents, and that such an allocation was an unconstitutional interference with her parental rights, was not properly raised before trial in the manner required by M.R.Civ. P. 24 (d). Rule 24 (d) requires that:

> [W]hen the constitutionality of an act of the legislature affecting the public interest is drawn in question in any action to which the State of Maine or an officer, agency, or employee thereof is not a party, the plaintiff shall notify the Attorney General, and the court shall permit the State of Maine to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality.

Here, the issue of the Curtis's desire for limited but regular contact between the child and the child's paternal grandparents, during months when he was outside the State of Maine on assignment with the U.S. Merchant Marine, was well-known to all parties and to the G.A.L. months in advance of trial—as was the G.A.L.'s

recommendation on the issue. *See* Exhibit P-13. This is not a situation where the Trial Court's decision itself introduced the issue giving rise to the alleged constitutional infirmity. Instead, this issue was raised at several points in the G.A.L.'s communication with the parties and in her report and recommendations shared with the parties. Despite being aware that the G.A.L. was recommending scheduled contact with the paternal grandparents, Medeiros did not raise a constitutional objection before trial in accordance with M.R.Civ.P. 24(d). Accordingly, Medeiros has not preserved the constitutionality issue for appeal. *See Thomas v. BFC Marine/Bath Fuel Co.*, 2004 ME 27, ¶ 5 ("Generally, issues raised for the first time on appeal are not preserved." *MP Assocs. v. Liberty,* 2001 ME 22, ¶ 18.)

Here, Medeiros's failure to properly raise and preserve this issue for appellate review had a significant impact on the conduct of the litigation. Pursuant to Title 14 M.R.S. § 5963, a party is required to notify the Department of the Attorney General of a constitutional question at the trial court level in order to give the Attorney General notice, and an opportunity to intervene. While M.R.Civ.P. 24(d) facially allocates this responsibility to the plaintiff in an action, the enabling mechanism to comply with Section 5963 does not explicitly specify who needs to

act.[2] On the particular facts of this case, the Rule has to be construed to shift that responsibility to Medeiros, as both the moving party and the party who raised the alleged constitutional infirmity.

Here, Curtis was the responding party, and was in no position to notify the Department of the issue prior to trial, as the constitutional question was never raised at trial or before. Hence, the Attorney General, and the State of Maine were deprived of exactly what both Section 5963 and Rule 24(d) require: fair notice, and an opportunity to defend the laws of the state. "The court shall permit the State of Maine to intervene *for presentation of evidence ... and for argument on the question of constitutionality.*" M.R.Civ.P. 24(d) [emphasis added].

C. Title 19-A M.R.S. § 1653(2) is Constitutional as Applied on These Facts.

Should the Court elect to ignore the issues of preservation and notice to the State, and consider the constitutionality of 19-A M.R.S. §1653(2)(B), the same result occurs: the Trial Court did not enter an unconstitutional order, and the Order should be upheld.

It is a fundamental rule of statutory construction that statutes are presumed constitutional, and the Court should not reach to address the constitutionality question without a fully developed record on the constitutional issue. Review of a

[2] The Rule was presumably drafted under the usual assumption that a Plaintiff is the initiating party in litigation, and that the initiating party challenging a statute would be in the best position to appraise the Department of Attorney General of the challenge at the outset of the litigation.

constitutionality challenge is bound by the well settled principle that "[a] statute is presumed to be constitutional and the person challenging the constitutionality has the burden of establishing its infirmity." *Kenny v. Dep't of Human Servs.*, 1999 ME 158, ¶ 7; *Rideout v. Riendeau*, 200 ME 198, ¶14. Accordingly, this Court must "assume that the Legislature acted in accord with due process requirements, if we can reasonably interpret a statute as satisfying those constitutional requirements, we must read it in such away, notwithstanding other possible unconstitutional interpretations of the same statute." *Portland Pipe Line Corp. v. Envtl. Improvement Comm'n*, 307 A.2d 1, 15-16 (Me. 1973).

This Court's role in reviewing the constitutionality of a statute "must necessarily be limited by the facts in the case" before the Court, and "may not reach beyond those facts to decide the constitutionality of matters not yet presented." *Rideout*, 200 ME 198, ¶15. "[A]n appellate court must be bound by two rules: 'one, never . . . anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never . . . formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' *Id.* (citing *United States v. Raines*, 362 U.S. 17, 21-22 (1960)).

Here, the Trial Court appropriately recognized the constitutional implications of its limited delegated allocation of contact, finding: "this contact will not interfere with the mother's fundamental right to parent her own child, nor

will it infringe on the mother's right to make decisions regarding her child." App. 26. Arguably, the very limited contact allocated to the paternal grandparents in the Order is no invasion at all of Medeiros's constitutional rights, as there are any number of scenarios where Curtis could authorize a third party (including the child's paternal grandparents) to tend, supervise, provide day care, or pick up and drop off the child, as a limited transfer of his own rights consistent with the doctrine of agency. What one parent or that parent's agent may do during contact time allocated to that parent is no business of the other parent so long as: (a) it presents no danger to the child, and (b) it is consistent with the child's best interests. Provision for third-party controlled daycare, schooling, and extra-curricular activities, are practical and beneficial arrangements commonly accounted for in family matter orders, particularly in situations where the parents struggle to communicate or co-parent effectively.

Here, the G.A.L. recommended, and the Trial Court found, the limited contact allocation to be safe and in the child's best interests. In fact, based on lengthy testimony, it became apparent to the Trial Court that these parents have excruciating difficulty communicating and cooperating regarding activities as basic as dental appointments—and needed the Trial Court's assistance in the Order to integrate mechanisms and a higher degree of structure than might be necessary in different circumstances. Tr. 92:3-24. It was the G.A.L.'s explicit opinion that in

the unique circumstances of this situation and important psychological welfare issues made the allocation of contact to the child's paternal grandparents necessary to protect the child from psychological harm. App. 26, 34; Tr. 74:2-20.

The contact allocation at issue here was not the result of an independent petition by a third party. It was the result of the Trial Court's consideration and assessment of the testimony of the parties, including a psychological health and wellness determination and recommendation made by the G.A.L., a licensed clinical psychologist involved in the case specifically to address the difficult family dynamics in play in this situation. The recommendation and resulting contact allocation was fully supported by the testimony and desires of one of the child parents. As a fact specific, health and wellness based decision, supported by one parent's exercise of his parental rights, the Trial Court's decision to schedule a limited allocation of contact to a familial third party—who both parents agree loves and has an important relationship with the child—is constitutional and should not be disturbed.

Curtis concedes that the Trial Court's Order contains some inconsistency in how the Trial Court characterized the contact allocation—in some instances making reference to an "award" of reasonable rights of contact to a third-party—rather that speaking in terms of allocating a portion of Curtis's rights. App. 25. In other instances, the Trial Court was more precise in articulating that it was

allocating to the paternal grandparents "contact with [the child]" one day a month in months when "[Curtis] is working out of State." App. 26.

The Trial Court was very clear, however, that the contact allocation to the paternal grandparents was recommended as necessary by the G.A.L., and was deemed to be in the best interest of the child, and had the full support of one of the parents. App. 25.

The Trial Court was also very clear that the limited contact allocation was a resolution of a contest of the competing shared parental rights of the parents, stating:

> In this case, one of the parents, [Curtis], fully supports his parents having contact with the minor child while he is out of State. [Curtis] works an alternating schedule, where he works two months on, followed by one month off from work. During the two moths that he is working, [Curtis] is on a boat in the Great Lakes, and [the child] is with her mother. The parties have shared parental rights and responsibilities. It is certainly not unreasonable for [Curtis] to have input on where [the child] spends part of one weekend a month when he is away at work.

App. 33. Further, the Trial Court was very clear that the resolution of this disagreement between the parents was driven by the Trial Court's assessment as to what "custody arrangements will further the child's best interest." App. 34. Through the allocation of contact to the paternal grandparents during the seven months Curtis is away, the Trial Court merely incorporated into the Order a mechanism whereby a small portion of Curtis's time was allocated to Curtis's

agents, the paternal grandparents, who have a close and clinically important relationship with the child that required regular contact.

Likewise, at the hearing, Curtis was very clear with the Trial Court that the allocation of contact time was rooted in a delegation of his own rights, not the independent right of a third party:

> [T]here certainly is precedent for a third party having significant supervision over the child as opposed to the parent....I think it would be within the Court's authority to order time to [Curtis], that if he is not available to take advantage of that they [the paternal grandparents] could take advantage of it, certainly if it wasn't prejudicing Ms. Medeiros.

Tr. 277:4-6, 14-17.

Curtis was similarly clear at the hearing about the need for the Trial Court's assistance with regard to scheduling contact:

> [W]e are concerned about the best interests of the child. There is concern that unless there is a requirement or language sufficiently clear about what does facilitating this relationship look like, that it won't occur...So with regard to them [the paternal grandparents] having a right, I'm not clear on what the Court's ability is. Whether the Court provides some clear guidance as to what facilitating a meaningful relationship looks like, that's where I would point the court.

Tr. 273: 9-13, 22-25.

A close analysis of the Trial Court's Order reveals that, in substance, the Trial Court allocated a portion of Curtis's time, nothing more, nothing less. It did not give the paternal grandparents any freestanding or independently enforceable

rights to see the child. In the event an enforcement action becomes necessary, it would need to be brought by Curtis, as an enforcement of the Order, and his rights thereunder. Notably: (1) the grandparents are not parties to the litigation[3], and (2) the allocation of time to the grandparents is only during those months "while the [Curtis] is working out of state" and not able to personally have contact with the child or facilitate contact between the child and the paternal grandparents. App. 26.

Accordingly, the Trial Court's Order should properly be seen as a delegated transfer of a limited portion of Curtis's rights of contact to his parents, a delegation that Medeiros is unlikely to honor or observe without it being incorporated into the Order. The Trial Court's decision on this point simply validated the father's parental rights, in a manner consistent with the best interests of the child, which does not equate to a violation of the mother's parental rights.

Finally, even if the Court wishes to ignore the many barriers to consideration of the constitutional issue, the facts in this case bear no resemblance to those in *Troxel*,[4] *Rideout* or their progeny, which are easily distinguishable as petitions by third parties without the support of at least one of the subject child's parents holding parental rights equal to any objecting parent.

---

[3] See, Levy, *Maine Family Law*, 8th Edition, § 6.4; *Davis v. Anderson* 2008 ME 125.
[4] *Troxel v. Granville*, 120 S. Ct. 2054 (2000).

At issue here is a very limited assignment of contact, squarely found to be in the child's best interests. It is important, incredibly instructive, and perhaps dispositive that when asked at the hearing about the contact allocation recommended by the G.A.L., Medeiros's only objection was that Medeiros didn't want to be obligated to permit the contact, even though she agreed that contact between the child and the paternal grandparents should continue. Tr. 93:9-20; 250:12-251:12.[5] Medeiros's objection to the third-party contact allocation had nothing to do with what was in the best interest of this child. The G.A.L. noted that Medeiros's position on this issue was hard to understand and reconcile. Tr. 93:10-15.

The Trial Court found that "[Medeiros] agrees that [the paternal grandparents] should continue to have a relationship with [the child], but she does not want to be obligated to do this. According to Dr. Tennies, this is typical of the parties' relationship. This is unfortunate and not in the best interest of [the child]." App. 34. The Trial Court took this into account in its decision and noted: "[Medeiros] recognizes that [the child] has a close relationship with [the child's paternal grandparents]. [The paternal grandparents] have watched [the child] for

[5] Tr. 250:12- 251:12.
[Question, Medeiros's attorney]: "[W]hy is it that you don't fully agree with Dr. Tennies' suggestion of what she talks about for that visitation with the grandparents?
[Answer Medeiros]: I agree that they can visit as they have done...What I don't agree is just the word, required, or the way I see, as being obliged to meet that—that line, oh, sorry, that requirement."

extended periods of time while [Medeiros] has been working out of state or in Brazil. [Medeiros] agrees that [the paternal grandparents] should continue to have a relationship with [the child], but she does not want to be obligated to do this. This is consistent with the dynamic between the parties, as explained by Dr. Tennies." App. 26. As the G.A.L. testified at the hearing: "[t]his is a fairly straightforward matter. There's very minimal disagreement, and they just need some mechanisms in place to move forward." Tr. 140:1-3.

Because the Trial Court's allocation of contact to the third party was in substance a delegation or limited transfer of Curtis's shared parental rights, not a recognition of a third-party's independent right, the Trial Court's action is not constitutionally unsound in relation to 19-A M.R.S. § 1653(2) as applied to the facts of this case. Further, this application and interpretation of the statute, as applied here, is reasonable and required to preserve the worthy assumption "that the Legislature acted in accord with due process requirements...notwithstanding other possible unconstitutional interpretations of the same statute." *Portland Pipe Line Corp. v. Envtl. Improvement Comm'n*, 307 A.2d 1, 15-16 (Me. 1973).

D. Maine Currently Recognizes Limited Transfers of a Portion of a Parent's Rights of Contact to a Family Member Who Has a Significant Relationship with a Child when Certain Duties Interfere with the Parent's Contact and the Limited Transfer Is in the Child's Best Interest.

Finally, if the Court has any lingering doubt about the Trial Court's authority to effectuate in its Order a limited transfer of the father's contact allocation to a family member who has a close relationship with the child, the Court should consider, by analogy, and take guidance and confidence from the clear resemblance of the situation in this case to the balancing and protection of competing parental and state interests articulated in 37-B M.R.S. § 389-A(7). In that portion of the Maine Servicemembers' Civil Relief Act, a serving member of the military service can transfer a portion of that parent's rights of contact to a family member who has a significant relationship with a child, when the duties of service interfere with contact, and the limited transfer is in the child's best interests. This statutory framework endorsed by the Legislature, clearly finds a compelling state interest in maintaining contact between the family of a deployed parent, and that parent's child, when it is in the child's best interest to do so.

The same compelling interest and rationale exists here. Not only did the Trial Court find that continued contact was in the child's best interests, it further observed that such contact was necessary to protect the child from psychological harm. The G.A.L. testified, and the Trial Court found, that during the two month

periods of Curtis's shipping deployment, the contact between the paternal grandparents and the child was also an important surrogate link between the child and her father. Tr. 74:2-20; App. 25, 34.

While there certainly could be facts on which 19-A M.R.S. § 1653(2)(B) could be found not to serve a compelling state interest, that is not so here. On the facts of this case, as explicitly found, the Trial Court had to balance the (at most) minimal intrusion into Medeiros's parental decision-making authority against the clear best interests of the child, protecting the child's psychological health, by incorporating into the Order a necessary scheduling mechanism to ensure a critical relationship was maintained with Curtis's family when he is away.

This was not error. It was well-considered jurisprudence. Had the Trial Court failed to do so, it would have ignored its well-established role, long held as the guiding principle in family law, that the Trial Court in family matters acts as *parens patriae* to ensure the best interests of the child under the Trial Court's protection. Reversal of this decision would make a fundamental change in Maine's law, and the record here in no way justifies such a change.

CONCLUSION

For each of the reasons expressed above, and in the Trial Court's Order, Curtis respectfully requests that this Court affirm the Trial Court's Order in all respects.

In the event that this Court concludes that a live, preserved constitutional issue exists concerning the Trial Court's application of 19-A M.R.S. § 1653(2), the appropriate remedy would be a remand to the Trial Court, with the Attorney General being given the right to participate and exercise her constitutional and statutory authority to defend the laws of this State.

Dated at Ellsworth, Maine, this 26th day of May, 2016.

APPELLEE, James-Robert G. Curtis,

BY _____

Jason C. Barrett, Esq., Bar No. 4326
Ryan P. Dumais, Esq., Bar No. 4244
Eaton Peabody
204 Main Street
P.O. Box 119
Ellsworth, Maine 04605
(207) 664-2900

CERTIFICATE OF SERVICE

I, Ryan P. Dumais, do hereby certify that I have made due service of the within Brief of the Appellee by mailing two copies thereof by regular course of the United States Mail, postage prepaid, on the 26th day of May, 2016, to:

Christopher R. Largay, Esq.
Largay Law Offices, P.A.
293 State Street
Bangor, ME 04401

Diane Tennies, Ph.D
115 Franklin Street, Suite 1A
Bangor, ME 04401

Ryan P. Dumais, Esq.